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VIRGINIA LAW REGISTER

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The death of Micajah Woods, which occurred at his home in Charlottesville on March 14th, 1911, removes a prominent figure from the Virginia Bar. He had **Captain Micajah Woods.** probably served as Commonwealth's Attorney longer than any other man in the history of the State. Elected in 1870, he was re-elected for every succeeding term and at the time of his death was still in office. He was a lawyer pre-eminently painstaking and careful—thorough in the preparation of his papers and cases. As an advocate he was cogent and eloquent and of great force before a jury and in prosecution absolutely fearless and zealous. He was President of the Virginia State Bar Association in 1908-'09 and held in high regard by that body. In private life he was marked by the most generous hospitality; by a kindness of heart and generosity of nature which made him beloved by his people. As husband and father, neighbor and friend, no man exemplified in a higher degree all the domestic virtues, and few men are more sincerely mourned. As was well said of him at a meeting of the Albemarle Bar held to pass resolutions of sympathy and respect: "He did not have a single fault which caused harm to any one in the world."

It is a singular fact that since 1850—up to 1911—a period of 61 years, Albemarle has had but three Attorneys for the Commonwealth: That great lawyer and distinguished jurist, Wm. J. Robertson, Col. R. T. W. Duke, and Micajah Woods.

The Supreme Court of the United States has by its unanimous decision sustained the constitutionality of the Corporation Tax.

The Federal Corporation Tax.

The country is to be congratulated upon the unanimity of the Court, for as a general rule in most great constitutional questions the Court has been divided, thus leaving a sense of doubt and in some cases distrust as the possibility of a future

reversal. We are not so sure—speaking from the standpoint of a strong believer in the rights of the States and in the strictest construction of the Constitution—that the decision is one upon which the country is to be congratulated. We have never believed the tax to be a direct one in the ordinary sense in which the word is generally used; but we have never believed that the Federal Government had the right to levy an “excise tax” upon the income of a creation of a Sovereign State when that creation enjoyed no right or privilege from the Federal Government. If that government can levy a tax of one per cent, why not of one hundred per cent and thus destroy these creations of the states. Publicity was one of the “side reasons” given for the passage of the act—in other words, vesting in the Federal Government power to enquire into the business of corporations. It is to be seriously doubted whether revenue was as much the object of the bill as inquisition. But of course the Supreme Court could not take cognizance of this. The sole question was not “why,” but “what.” The opinion, Day, J., delivering it, has not reached us in full at our time of going to print, but the following excerpts have reached us and may not prove uninteresting. As to its being an excise tax, the Court says:

“The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity—i. e., with the advantages which arise from corporate or quasi-corporate organization—or, when applied to insurance companies, for doing the business of such companies. The requirement to pay such taxes involves the exercise of privileges and the element of absolute and unequivocal demand is lacking. If business is not done in the manner described in the statute, no tax is payable.”

“The Constitution contains only two limitations on the right of Congress to levy excise taxes. They must be levied for the public welfare and are required to be uniform throughout the United States.”

In affirming the Federal power to tax State corporations, the court holds “that the revenue of the United States must be obtained in the same territory, from the same people, and excise taxes must be collected from the same activities as are also reached by the States in order to support their local governments.”

If this broad principle were not true, says the court, persons could invalidate the taxing power of the Nation simply by

continuing their business under a State franchise. Point is given to this declaration by the citation of the South Carolina Dispensary case. There it was held that South Carolina, as long as it ran the liquor business, would have to pay the excise liquor taxes levied by Federal statute for the whole country. This decision was based on the theory that the whisky dispensary, though public in form, was essentially private in character, in that it was not expected that the States should engage in trade.

The plea that the tax is not uniform because it discriminates so sharply against corporations in favor of business done by partnerships or private persons the court answers simply by stating that uniformity, in the sense used by the Constitution, means only geographical uniformity. The practice has always been to levy on some occupations and to omit others, and this is true of both the States and the Federal Government. Besides this, the advantages to be derived from a corporate existence are such as to make the distinction very real and reasonable.

"The thing taxed," said Justice Day, "is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate Directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."

A part of the decision—which may not, however, be more than mere dictum—is that in which the Court says that municipalities owning their gas works, water works and electric light plants are carrying on a business essentially private though public in form and thereby gives an inference that the income of cities arising from those industries are liable to taxation. We shall

have to see the whole opinion and not mere garbled extracts before we comment upon this part of the opinion. The Court cites *Osborne v. The Bank*, of course, and quotes with approval Chief Justice Marshall's opinion that the right of a state to tax the Bank in that case was denied solely on the ground that the Bank (that of the United States) was performing an essential function of the government. Had it been in reality a private corporation, the tax would have been legal.

The Supreme Court has decided that West Virginia owes the State of Virginia \$7,184,500 as its part of the debt of the original State. The opinion of the court has not yet been printed and we do no more than state the result. The question of interest remains undecided. Why, we are not yet able to inform our readers.

A point of much interest has lately been decided by the Supreme Court of the United States in the case of *American Land Company v. Zeiss*. The State of California by an enactment of its Legislature made provision for restoring the record title to land in San Francisco, which had been well nigh destroyed by the great earthquake and fire of April, 1906. The act itself was general in its nature and provided a means by which public records could be restored when lost or destroyed in whole or in any material part by flood, fire or earthquake. A form of action and a summons was provided for, which summons was to be directed to "all persons claiming any interest in or lien upon the real property" described. Personal service was required as to parties known to be in the State and publication in a newspaper as to nonresident or unknown claimants who could not be found with due diligence. But to all persons whose address was known a copy of the summons was required to be mailed in a sealed postpaid envelope. Mailing the summons was also provided for in case of residents who could not

with due diligence be found within the period of the publication—two months. And in addition to this a copy was required to be posted in a conspicuous place on each separate parcel of the property described. The act then provided for appearance, proof and judgment and proper recordation of the judgment.

The American Land Company claimed real property for which one Zeiss had obtained title under the provisions of this act, although the said company was a resident of California and easily reached and had never received notice. All the terms of the statute had been complied with by Zeiss, but the company claimed the provision of the statute as to notice were repugnant to the "due process" clause of the Federal Constitution. The Supreme Court, White, C. J., delivering the opinion, upheld the statute and in a most interesting and able way discussed the power of a state over titles to land. The Court quotes *Arndt v. Griggs*, 134 U. S. 316.

"It was there held that, even as to ordinary controversies respecting title to land, arising between rival claimants, the State possessed the power to provide for the adjudication of titles to real estate not only as against residents but as against non-residents, who might be brought into court by publication. In the course of the opinion the Court said (p. 320):

" 'It (the state) has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice.' "

It may be observed that after judgment, which could only be obtained after what was practically four months' time from the first publication, no person could appear and contest, though as to evidence, pleading, practice, new trials and appeals the rules of law applicable to other civil actions applied to this proceeding. Under these rules a party without actual notice could come in at any time *within one year* and make defence and have the decree vacated so as to allow him a trial on the merits. The court referring to this as sufficient to meet all "due process" provisions, said:

"It should be kept in mind that the laws of a state come under the prohibition of the 14th Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law cannot give personal notice of its provisions or proceedings to every one. It charges everyone with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises."

The Court reiterates the definition of "due process" laid down in *Twining v. New Jersey*, 211 U. S. 78, 53 L. Ed. 97, as follows:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws statutory or judicially declared, regulating procedure, evidence and methods of trials, and held them to be consistent with due process of law."

It seems to us that there can hereafter be very little room for argument upon the *legal* point as to what constitutes "due process." Of course the question of *fact* will always arise, but unless the "facts" as to form and service are in dispute there can be little else for the Court to pass upon.

The case of *Sutherland, etc. v. People's Bank, Inc.*, annotated in the February number of the REGISTER, p. 751, was undoubtedly decided correctly in view of the **Conclusiveness of unbroken line of decisions in Virginia, Service of Process.** and the court could not well have decided other than it did. But as suggested by our associate, there is a loud call for legislative interference and an amendment of the statute should certainly be made. For we are no longer "homekeeping" people—more's the pity. Many homes are closed both in winter and summer for three or more months whilst the families are in Florida or in the mountains or at the seaside. Sometimes men have summer homes, whilst their actual residences are elsewhere. The opportunity for the working of great injustice by "posting process" and making it equivalent to actual personal service is far greater now than it was in the olden days and the statute should be amended so as to allow an appearance within a reasonable time, setting up fraud or mistake. We would suggest to our law-makers that an amendment in this shape might aid in curing the evil: Amend § 3207 by adding after the words, "leaving such copy posted at the front door of said place of abode," the following:

"But any sheriff, sergeant or constable so posting said notice shall at once make return of the process or notice to the Clerk's Office with the endorsement of such posting thereon, and thereupon it shall be the duty of the Clerk to deposit in the United States Postoffice nearest his office, enclosed in a sealed envelope, postage prepaid and duly registered with a receipt card attached, a copy of the summons or notice, said envelope to be addressed to the last known post-office of the person to whom such notice or summons is addressed, or if no such postoffice be known to the Clerk, to the postoffice nearest the usual place of abode of the person to be summoned, on which envelope a request to return to the Clerk if not delivered in 5 days shall be plainly printed or written, and on the return of said card receipt he shall attach the same to the copy of the process returned as aforesaid by the officer posting the same, and if the said card be signed with the name of the person to whom addressed, or by any other person for him, this shall be conclusive evidence of the service of said process on said person.

"But in case said card receipt is not returned to the Clerk and the envelope containing the summons is returned to the

Clerk by the postoffice as "undelivered," the Clerk shall file the envelope with the process and endorse the fact of the return of the envelope on the same, and file with the papers in the suit or action.

Then add at the end of Section 3223:

"And any person as to whom notice was served by posting the same at the front door of his usual place of abode and who did not by himself or another sign the card receipt for a registered letter as provided for in Section 2207, and did not appear to answer said process, may at any time within one year after the rendition of a judgment order or decree against him, appear and have the cause in which such judgment order or decree was entered re-opened as to him for good cause shown, and may demur, plead, or answer in the cause as if the judgment, order, or decree had not been rendered as to him."

Of course the clerk should be allowed an additional fee for this and the postage and registry fee, along with this additional fee, should be taxed in the costs as usual.

We offer this amendment as being probably the surest way of reaching a person "absent from his usual place of abode," and it is a method which has been adopted in more than one state in the Union.

It is claimed by those who oppose reform in our present antiquated and cumbrous system of pleading, that any system which may be devised will have to be passed upon by the Supreme Court time and again and will give rise to innumerable questions and "points" until it will be as cumbrous and overladen with judicial decisions as our present system.

Judgment by Notice and Motion. An inspection of the decisions of our Supreme Court upon § 3211 of Pollard's Code does not seem to bear out this claim. The section in question was first enacted in 1849—sixty-two years ago. It has been before our Supreme Court of Appeals but thirteen times in all that time as to any question of procedure and it may not be uninteresting to make a brief statement of the points decided. In *Hale v. Chamberlain*, 13 Gratt. 658, when 40 days notice was required, the Court decided that the

notice had to be docketed before the term of the court to which it was made returnable.

In *Preston v. Salem Imp. Co.*, 91 Va. 583, the Court decided that the issue upon a notice was to be made up by a plea or simple statement of defense except in cases where the plea had to be verified by affidavit.

In *Morotock Ins. Co. v. Pankey*, 91 Va. 259, it was decided that a motion under the section would lie to recover a loss under an insurance policy, and that the notice took the place of both writ and declaration.

In 92 Va. 584, *Long v. Pence* decided that an assignee of a chose in action could proceed under this section.

In *Wilson v. Dawson*, 96 Va. 687, it was held that the notice could not be used if the claim "sounded in damages."

In *Gordon v. Funkhouser*, 100 Va. 675, the Court decided that a motion under this section *was* an action at law, but in 101 Va. 208, *Furst Bros. v. Banks*, the Court decides it is *not* such an action as would authorize an attachment to issue until it has been duly docketed.

In *Breeden v. Peale*, 106 Va. 39, it was held to be an action at law and that an attachment may issue when the notice is docketed.

Neither *Breeden v. Peale* nor *Furst v. Banks* alludes to *Gordon v. Funkhouser*, which we think unfortunate, as at a glance these cases might seem to be contradictory, though they are seen not to be on careful reading.

In *Reed, etc. v. Gold, etc.*, 102 Va. 37, the Court again decides the motion to be an action at law and refers to *Gordon v. Funkhouser*.

Stummell v. Benthall, 108 Va. 141, holds that strict rules of pleading do not apply to motions—or to set-offs.

Swift v. Wood, 103 Va. 494, decided how the five days in which to docket were to be computed.

Security Loan & Trust Co. v. Fields decided March 10th, 1910, 67 S. E. Rep. 342, reiterates the principle laid down in *Stummell v. Benthall*, but does not allude to this latter case or indeed to any cases except *Morotock Ins. Co. v. Pankey*, *supra*, and *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, which two cases decided that notice and motion could be used to recover a loss on

an insurance company policy and the latter case affirming the doctrine which had been well settled in cases of motions upon official bonds, that the rule governing notices is that they are presumed to be the act of the parties and are viewed with great indulgence by the Court. In the latter case the Court lays down the rule which might well be adopted as a polar star in all questions of pleading: *"If the notice is such that the defendant cannot mistake its object it will be sufficient."*

In the light of this section and the decisions upon it, it is very hard to see why our whole system of common law pleading should not be reduced to a simple notice. An effort has been made in two separate General Assemblies to allow this notice to be used in cases of torts as well as of contracts. A skillful lobby, whose origin can very well be guessed at, has so far kept this simple and salutary method of practice off of the statute books, but we believe that it must ultimately become law. There is no good reason why it should not do so, nor can we see any why a simple notice stating clearly the object of the suit should not be used in every form of common law procedure. England has used it now for many years with unquestioned ease and success. We followed her lead in the one case; why not in the other?

The case of Lane Bros. Company v. Barnard's Admr., decided January 12th by our Supreme Court of Appeals, applies the doctrine of master and servant as far as negligence is concerned to a traveler in the public highways killed by reason of explosions of the "pop" valve in a stationary engine frightening his horse and causing it to shy and throw him from a cart. The court says the "rule is the same in a case like this as in master and servant cases. See Norfolk, etc., Traction Co. v. Daily's Admr., just decided by this Court." It is hard to reconcile this view of that doctrine with the case of Richmond, etc., Ry. Co. v. Reuben, 102 Va. 814, where the court declined to apply the rule laid down in Bertha Zinc Works v. Martin, 93 Va. 791 (which was a case of master and servant), to that case, the master being only obliged to use

ordinary care to his servant, whereas towards a *passenger* or *stranger*, great or extreme care must be used and "the question of negligence or due care" being said by the court in the *Richmond v. Reuben* case, *supra*, "is one peculiarly within the province of the jury." Pp. 814, 815.

In the case under discussion Lane Bros. Co. were contractors building a road in Amherst County under contract with the Board of Supervisors. They had on the roadside a "pop valve" which when steam pressure grew too high automatically blew off, throwing steam out and making a loud noise. There was some conflict as to whether the steam drifted across the road in the horse's face frightening him, or that he was only frightened by the noise. The court held that Lane Bros. could only be held for ordinary care—"the conduct of the average prudent man."

The authorities do not seem to bear out this conclusion of our court. See Wood on Nuisances (3rd ed.), § 301, where it is said:

"Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom such power is given is bound to exercise the right conferred upon him, not only strictly within the provision of the law, but also to exercise the *highest degree* of care to prevent injury to the persons or property of those who may be affected by their acts." (Italics ours.)

Along the same line and to the effect that it is incumbent on the defendant doing the work that Lane Bros. were doing to take precaution against the dangerous operation and condition in order to avoid injury or death to the travelers on the highway, see:

Elliott on Roads and Streets (2nd Ed.), §§ 649, 851, 616, and notes; Sherman & Redfield on Neg. (5th Ed.), Vol. 2, p. 774, and notes; Bennett & Lovell, 34 Am. Rep. 628, and notes; 30 Am. Rep. (Mass.) 692; 1 Wood on Nuisances, § 293 (p. 368); 2 Cooley on Torts, p. 1296; *Smith v. Edison, etc., Co.* (Mass.), 15 L. R. A. (N. S.), 958, 14 Am. Neg. Rep. 651.

But be that as it may the law is settled in Virginia and travelers on the highway must govern themselves accordingly.